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Federal Communications Commission
Office of the Secretary

EX PARTE OR LATE FILED

October 27, 1992

Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: **Ex Parte Contact in CC Docket No. 92-13**

Dear Ms. Searcy:

On October 26, 1992, James S. Blaszak and the undersigned on behalf of the Ad Hoc Telecommunications Users Committee met with Kathleen Abernathy (Commissioner Marshall's office) and Linda Oliver (Commissioner Duggan's office) to discuss the above-referenced docket. The attached material was discussed at these meetings.

Sincerely,

Patrick J. Whittle

cc: Kathleen Abernathy
Linda Oliver

POSITION OF THE AD HOC TELECOMMUNICATIONS USERS COMMITTEE IN CC DOCKET NO. 92-13

The competition engendered by the Competitive Common Carrier rulemaking has benefitted all consumers, exactly as the Commission projected that it would. To assure that this intensely competitive marketplace not become the victim, rather than the foster child, of regulation, the Commission should take the following specific steps:

(a) Exercise its discretion, newly ratified by Congress in passing the Telephone Operator Consumer Services Improvement Act of 1990, by preserving forbearance for OCCs as it exists today (see attached Summary Of Legal Analysis Of The Lawfulness Of Forbearance);

(b) Clarify that while facilities-based carriers can elect to file tariffs for generic services, they do not thereby forfeit the right to engage in individualized transactions under contract, and expressly and separately forbear from requiring that these transactions be tariffed;

(c) Expressly and separately forbear from requiring tariff filings by resellers, whose rates are necessarily constrained by the rates of the underlying facilities-based carriers;

(d) Further streamline its regulation of the tariff filings that nondominant carriers do make;

(e) Clarify the applicability and scope of the substantial cause test in the context of nondominant carrier filings, to assure that contracts are efficacious economic ordering devices in this industry as they are in the unregulated sphere; and

(f) Spell out that its rules permit a nondominant carrier to provide a portion of its services on a private carriage, rather than a common carriage, basis (see attached Summary Of Legal Analysis Regarding Private Carriage).

Summary Of Ad Hoc Telecommunications Users Committee Legal Analysis Of The Lawfulness Of Forbearance

There is no merit to AT&T's argument that court decisions, in MCI Telecommunications Corporation, 765 F.2d 1186 (D.C. Cir. 1985) and Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 110 S.Ct. 2759 (1990), forbid forbearance. Moreover, even if these cases created some doubt as to the Commission's historic interpretation of the Act as giving it the power to forbear, Congress has now clearly ratified the Commission's interpretation by its enactment of certain strictly limited curbs on the exercise of the forbearance power in the operator services marketplace.

The Maislin case, first of all, is irrelevant to the lawfulness of forbearance, for the Interstate Commerce Commission (ICC) had not, in that case, established a forbearance policy. Instead, while leaving in place the tariffing regime for motor carriers, the ICC had established a policy prohibiting as an unreasonable practice the charging of the tariffed rates in instances in which the carrier had negotiated a different rate directly with the shipper. It was this contradiction that the Supreme Court highlighted as beyond the ICC's power, since tariffs mandatorily filed establish, by law, the lawful rate for the services to which they apply. The ICC had not excused the carrier from filing tariffs -- and in particular had not relied on its power to modify tariffing requirements themselves under 49 U.S.C. § 10762(d)(1). Thus, the Court did not address, even in

passing, the lawfulness of a forbearance policy. It held only that, not having forborne from requiring carriers to file tariffs, the ICC could not, as a blanket matter, declare that to collect tariff rates instead of contract rates was an unreasonable practice.

In MCI v. FCC, the Court of Appeals expressly stated that it was not reaching the question of whether forbearance itself was within the Commission's power and indeed noted that the move from forbearance to forbiddance in the Sixth Report and Order "fundamentally altered" the regulatory regime. Any references in the case to forbearance as such are therefore mere dicta and any assertion that MCI v. FCC controls the instant proceeding is wrong as a straightforward matter of law.

This is not to deny the Commission's need to examine the Court's reasoning in MCI v. FCC to determine whether it sheds any light on the scope of the Commission's authority. But the Commission should refrain from assuming that sweeping pronouncements by the Court are literally applicable to the forbearance scenario. Such a course would not only be incautious but would be an abdication of the Commission's duty to exercise its own independent expert judgment about the meaning of the statute it is called upon to administer. Thus, the reliance by AT&T on Court language such as "'Shall,' the Supreme Court has stated, 'is the language of command'" cannot simply be accepted at face value but must be assessed by the Commission in relation to its uncontested power to modify tariffing requirements under

certain circumstances, and in relation to other sources of authoritative guidance on how the Act is to be interpreted. Moreover, the Court in MCI v. FCC expressly recognized that the dictum "'Shall' . . . 'is the language of command'" does not hold true in the face of "a clearly expressed legislative intention to the contrary."

Fortunately, just such a clearly expressed legislative intention is supplied not only by Section 203(b) itself, but also by subsequent Congressional action that plainly ratifies the Commission's conclusion that it possessed forbearance power -- namely, the passage in 1990 of the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA). This act was specifically designed to rectify what the Congress considered abuses by some members of a small subgroup of the class of nondominant carriers -- operator service providers. The Congress was well aware that the Commission had forborne from regulating nondominant carriers, and quite plainly saw nothing unlawful, or even doubtful, about the Commission's assertion of the power to forbear. By expressly following a minimalist regulatory tack for those segments of the industry in which abuses had been identified, the Congress clearly determined that there was no reason to disturb the forbearance status quo for nondominant carriers generally. This congressional ratification of forbearance is clear authority for maintaining it in place.

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For citations and further detail, see Comments of Ad Hoc Telecommunications Users Committee, filed in CC Docket No. 92-13, on March 30, 1992, at pages 7-13.

Summary Of Ad Hoc Telecommunications Users Committee Legal Analysis Regarding Private Carriage

In the Interexchange Competition rulemaking (CC Docket No. 90-132), the Commission sketched out in the NPRM a proposed procedure whereunder AT&T could apply under Section 214 of the Act for Commission permission to "discontinue" a specified portion of its common carrier services so that it could free up capacity on its network for the offering of services on a private carriage basis. The Commission tentatively concluded that it had the power to establish such a procedure, citing, among other cases, Domestic Fixed-Satellite Transponder Sales, 90 F.C.C.2d 1238 (1982), aff'd sub nom. Wold Communications, Inc. v. FCC, 735 F.2d 1465 (D.C. Cir. 1984). Although the Commission has not, as yet, adopted private carriage for AT&T, the time is ripe for the Commission to establish a clear mechanism for allowing nondominant carriers to offer a portion of their services as private carriage. While the Ad Hoc Committee believes that the nondominant carriers already have the authority to do this under existing rules, it would be very beneficial to the marketplace if the Commission would provide clear confirmation that this is in fact the case.

The distinction between common and private carriage has been perhaps most lucidly adumbrated in NARUC I. In that case, the Court of Appeals noted succinctly:

> [T]he critical point is the quasi-public character of the activity involved. To create this quasi-public character, it is not enough that a carrier offer his services for a profit, since this would bring within the definition private contract carriers which the

> courts have emphatically excluded from it. What appears to be essential to the quasi-public character implicit in the common carrier concept is that the carrier "undertakes to carry for all people indifferently . . . ."
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> * * * *
>
> But a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal.

The Court explicitly noted in that case that it is not the number or type of clientele served that matters, it is the carrier's manner and terms of dealing with them.

Patently, the same entity may deal with clients in different ways, even from transaction to transaction -- and it is well established, therefore, that the same entity may offer both common carriage and private carriage services. The Court of Appeals made this clear in Wold, supra. Moreover, the Court expressly approved the Commission's determination that it could protect the public interest in such a case by carefully assuring itself that there would still be sufficient capacity dedicated to common carriage to meet foreseeable demand for common carrier services. The Court identified a number of other instances in which the Commission had determined that the public interest would be served by side-by-side common and private carriage regimes, including the Land Mobile Radio Service and Allocation of Microwave Frequencies Above 890 Mc proceedings.

Since Wold, the Commission has adopted a policy that domestic satellite licensees should be routinely authorized to offer transponders on a noncommon carrier basis absent a showing

that it would not be in the public interest. The climate is now ideal for the Commission to make clear that what it did for domsats it will do for other nondominant carriers: routinely authorize them to offer service on a noncommon carrier basis absent a showing that it would not be in the public interest. The Commission has found, in CC Docket No. 90-132, that the interexchange marketplace is characterized by large amounts of excess capacity, and it is highly unlikely that nondominant facilities-based carriers would elect to place such enormous portions of their capacity into a private carriage regime as to jeopardize their common carriage customers. Thus, a presumption can safely be adopted that nondominant carriers may, consistent with the public interest, withdraw some stated percentage of their capacity from common carrier use in order to use it to provide private carriage.

The Commission need not even substantively amend its rules to permit this. Existing Section 63.71 of the Commission's Rules provides streamlined procedures whereunder nondominant carriers may file, pursuant to Section 214 of the Act, for Commission authorization to discontinue, reduce or impair service, under substantially streamlined procedures. The rule provides: "The FCC will normally authorize this proposed discontinuance of service (or reduction or impairment) unless it is shown that customers would be unable to receive service or a reasonable substitute from another carrier."

The Commission should expressly state that nondominant carriers are permitted to use this avenue to discontinue or reduce common carrier service for the purpose of allowing part of their capacity to be used for private carriage. Moreover, the Commission should make clear its expectation that, in many if not most instances of applications made for this purpose, it is unlikely that there will be any affected customers to the extent that facilities-based carriers continue to provide common carrier services with much of their capacity, and that the grounds stated in the rule for denial of the application are extremely unlikely to be met. In this way, the Commission can provide the marketplace with a well-defined, procompetitive private carriage mechanism which it may rely on in addition to, or in lieu of, forborne common carrier services.

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For citations and further detail, see Comments of Ad Hoc Telecommunications Users Committee, filed in CC Docket No. 92-13, on March 30, 1992, at pages 26-31.